STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Enbridge Pipelines (Illinois), L.L.C.,	)	
	)	
Application Pursuant to Section 8-503, 8-509 and	)	07-0446
15-401 of the Public Utilities Act/The Common	)	Upon Reopening
Carrier by Pipelines Law to Construct and Operate	)	
a Petroleum Pipeline and When Necessary to Take	)	
Private Property As Provided by the Law of	)	
Eminent Domain.	)	

PLIURA INTERVERNORS
MOTION PURSUANT TO PROTECTIVE ORDER TO REMOVE DESIGNATION OF CONFIDENTIALITY

NOW COME the Intervenors herein who throughout these proceedings for convenience purposes have been identified as "Pliura Intervenors", by and through their mutual counsel, Thomas J. Pliura, M.D., J.D., and pursuant to paragraph 13 of the Protective Order entered herein on September 4, 2014, respectfully move the Honorable Administrative Law Judge for an Order overruling and removing the confidentiality and proprietary designation asserted by Applicant as to its "Supplemental Responses to Data Requests". In support of said motion, Intervenors respectfully state as follows:

1. The instant proceeding began as a petition for Certificate in Good Standing for operation as a common carrier by pipeline and a related request for Eminent Domain authority, docketed as 07-0446.
2. The Final Order in 07-0446 granted a certificate in good standing to construct, operate and maintain a 36-inch liquid petroleum pipeline to be operated as a common carrier. Eminent Domain authority was denied but with leave to seek such authority in a subsequent proceeding if necessary.

3. After a lengthy delay due to the "great recession" Applicant subsequently filed a new petition for Eminent Domain Authority to acquire the rights-of-way necessary to construct the 36-inch pipeline approved in the 07-0446 final order.
4. That application was approved and is presently on appeal.
5. Applicant then filed a motion to reopen the 07-0446 proceedings and motion to amend the Final Order to permit it to change the diameter of the approved pipeline from 36-inches to 24-inches to match its actual project plans. That matter, docketed as 07-0446 (reopened) is the instant proceeding and remains pending.
6. During the reopened proceedings, it has now become apparent that the amended project is not simply a different size/capacity of pipeline and carrying a different product (domestic light vs foreign heavy crude), from a different origin, but the project is no longer a common carrier by pipeline. It is instead, a proprietary line for Applicant's part owner, Marathon.
7. This new arrangement is directly contrary to the evidence previously offered by Applicant in support of the 07-0446 Order; *to wit*,
    a. Applicant previously presented the sworn testimony of Dale Burgess, Director of the SAX project. Burgess testified, under oath, in the original proceeding, "Prior to building a 36-inch line Enbridge conducted…an open season. ***Numerous producers and shippers want to have the Patoka hub. *** Better access to the Patoka hub is important to shippers…because it will make the desired Canadian crude available to more entities that can process it. (Enbridge Ex. 1, pages 5-6).
    b. In rebuttal testimony offered by Applicant, Burgess testified under oath, explaining why the SAX project was different from the Keystone XL project.

"84% of Keystone's capacity is committed to shippers via long term capacity contracts.***Only 16% of Keystone capacity will be available to shippers on a spot basis.***__In contrast the [SAX] will be a fully open access pipeline__.*** **Finally, the Keystone project is partially owned by a company that is both a major U.S. refiner and a large producer of Canadian crude oil in contracts to Enbridge with is neither a producer of crude nor a refiner."**(Enbridge Exhibit 1a, page, 21, Emphasis added). Burgess was, of course, referring to ConocoPhillips, co-owners of the Keystone XL project.

c. Now the Applicant wishes to turn the testimony and other evidence in 07-0446 on its head. Adopting the Keystone model, we now know through the determined efforts of the Intervenors herein that the SAX, as it has now been surreptitiously re-imagined by Enbridge, is a completely different project than what Burgess testified to. Now, there is one big shipper accounting for nearly all of the committed capacity of the SAX. That one shipper is Marathon, a major refiner and now co-owner of the SAX. There is allegedly just one other small undisclosed shipper committed to this project with little remaining capacity for spot shippers., who were required under the Open Season to enter into long-term capacity contracts. No longer are "numerous producers and shippers" apparently clamoring for more capacity to move Canadian crude to Patoka. That need, if it ever existed, has evaporated. This project looks nothing like what was approved in the underlying 07-0446 proceeding.

8. To that end, on August 11, 2014, Movants served Applicant with a set of fifteen data requests which, if actually answered by Applicant, would demonstrate that the SAX

project as currently configured, bears no resemblance to what Dale Burgess testified to and is, instead, a proprietary pipeline dedicated almost exclusively for the purpose of shipping Marathon product to Marathon refineries.

9. On August 25, 2014, on the final date within which Applicant could timely respond, Applicant served movant with a response to the data requests that was largely non-responsive on these critical important issues.

10. On August 26, 2014, Pliura Intervenors made a filing entitled "Motion to Compel and Motion to Vacate Filing Deadline and Hearing Date". Therein, Movants sought a ruling compelling Applicant "to completely answer all [Movants'] data requests."

11. On September 3, 2014, the Honorable ALJ entered an order addressing the motion. Therein,

    a. As to DR 5 and 8, the order states,

> "DRs 5 and 8 relate to the production of documents in Applicant's possession "disclosing revised calculations of public benefit due to the reduced pipeline diameter and reduced pipeline capacity" and "due to the change in primary product to be shipped from Canadian heavy crude to Bakken light oil."
> It is observed that in support of its Motion to Reopen and Amend Order, Applicant states in part, "Marathon Petroleum Company L.P. ('Marathon'), which operates three PADD II refineries, including one in Robinson, Illinois, that are reachable via the Patoka Hub, has now committed to have Enbridge move light crude to Patoka via the SAX pipeline in order to supply these refineries. Marathon has contracted for enough of the line's initial capacity to warrant construction of the line." (Motion to Reopen at 5)
>
> Similar statements are made in Applicant's Reply on Motion to Reopen and other filings.
>
> As such, in terms of purpose and need, as updated, Applicant's Motion to Reopen is relying on the commitment from Marathon. For discovery purposes, Movants' DRs 5 and 8 are reasonably related thereto.
>
> Accordingly, it is hereby ruled that Applicant shall send, on or before September 5, 2014, a supplemental response to DRs 5 and 8 that either

contains a copy of the requested documents (or portions thereof) containing such calculations, or indicates that Applicant has no such documents in its possession."

b. With respect to DR 9 and 12, the Order states, impertinent part:

> DR 9 asks, "What percentage of the shipper commitments now in place for the SAX is from companies other than Marathon Petroleum or its subsidiaries and affiliates?" ***
>
> DR 12 states, "Please provide documentation detailing all current shipper commitments for the SAX. If it is the position of the applicant that disclosure of such information is prohibited by state or federal law or regulation, please provide a citation to all such statutes or regulations upon which Applicant asserts a limitation on disclosure." ***
>
> The DR response does not identify the amount or percentage of the 210,000 barrels per day ("bpd") that is attributable to Marathon. For discovery purposes, this information appears to be reasonably related to the updated purpose and need as discussed above.***
>
> It is hereby ruled that Applicant shall identify, in a supplemental DR response to be sent on or before September 5, 2014, the amount of the 210,000 bpd that is attributable to Marathon. If Applicant believes this number may not be disclosed due to confidentiality, it can file a motion seeking relief in that regard; however, if Applicant chooses to file a motion rather than including the information in a supplemental DR response, it is not known what effect this would have on the schedule in this proceeding.

c. With respect to DR 10, the order states, in pertinent part:

> In DR 10, Movants ask, "What percentage of the shipper commitments now in place for the SAX is for the transportation of Canadian Heavy Crude?" ***
>
> In Applicant's response to the Motion, it is not clear whether the term "shippers do not commit" is intended to apply to the particular shippers with "commitments now in place for the SAX." It is hereby ruled that Applicant shall submit, on or before September 5, 2014, a supplemental response to DR 10 providing clarification.

12. Notwithstanding this clear and unambiguous order, Applicant moved on September 4, 2014 to reaffirm a protective order previously agreed to and previously signed by the parties.

13. The Honorable ALJ then almost immediately issued an order on September 4, 2014 granting the Applicant's motion, without seeking or allowing any input from the Intervenors.

14. Astoundingly, notwithstanding the ALJ's near-immediate response to Applicant's motion for protective order, and with no justification or authority whatsoever, on September 5, 2014, counsel for Applicant sent an email messages to counsel for Pliura Intervenors demanding an additional affirmation by counsel for Pliura Intervenors that he would abide by the protective order.

15. At around 4:53PM on September 5, 2014, counsel for Applicant sent another e-mail message again demanding his "affirmation", providing evasive, argumentative, unverified and incomplete answers to DR 5, 8 and 10 and no answer whatsoever to DR 9 and 12. Astoundingly, with respect to 9 and 12, counsel actually produced a blank piece of paper.

16. Then on September 8, 2014, the Honorable ALJ *sua sponte* issued an order demanding that Applicant provides answers to the following questions ("Qs"):

> Q1: Has the "amount of the 210,000 bpd that is attributable to Marathon" ("Subject Information") been provided to Pliura Intervenors?
>
> Q2: Has the Subject Information been provided to Turner Intervenors?
>
> Q3: If the answer to the either or both of the questions above is "No," does Applicant intend to provide the Subject Information to such Intervenors on a confidential basis pursuant to the protections afforded in and terms of the Protective Order approved in a ruling issued September 4, 2014?

> Q4: If the answer to Q3 is "No," does Applicant intend to invoke and implement the "additional protections" or "no disclosure" provisions of paragraph 18 of the Protective Order?
> Please note: What effect the invoking of such provisions will have on the current schedule in this proceeding is unknown.

17. Prior to responding to the ALJ's order, Applicant's counsel sent a revised response which included the missing page. It came, of course, three days after the deadline and only after the ALJ's *sua sponte* order.

18. But, even after being forced to abandon its gamesmanship and belatedly provide the withheld response, the response was non-responsive. Specifically, the amount of the 210,000 bpd attributable to Marathon was not actually included in the response. What was included instead was a lengthy unverified argument by counsel as to why Intervenors should not be entitled to the information, together with an unwarranted assertion that this non-responsive response was "confidential and proprietary".

19. Pursuant to paragraph 13 of the Protective Order in place herein (at Applicant's instance) on October 3, 2014, Pliura Intervenors served Applicant with the required objection to this confidentiality designation.

20. Then, on October 16, 2014, Applicant filed with the ICC via eDocket a written Response to the Objection to Claim of Confidentiality and Proprietary Information.

21. Paragraph 13 required this Response to be given within 5 days and therefore the Response itself is untimely per the Order but is consistent with a more liberal interpretation of the discussion held on the record on September 4, 2014 (Transcript at 1391-1394).

22. For no apparent reason, Applicant suggests at paragraph 2 of its Response that it assumed Intervenors would be filing the notice of objection and that it, therefore waited until

October 16, 2014, nearly three times longer than the specified time frame, to file its response.

23. This attempt to suggest Intervenors have not followed the process defined by paragraphs\ 13 of the Protective Order is quite surprising given the clear and unambiguous language of paragraph 13 that Applicant, itself authored. It states,

> "If a party does not agree with the Producing party's designation of documents and information as "confidential" or "confidential and proprietary", the party (the "Challenging Party") shall give the Producing Party reasonable written notice, **by e-mail** or by U.S. Mail of the objection". (Emphasis added)

24. Applicant's position is further refuted by the statements of Applicant's counsel, Mr. Reed, at the September 4 hearing.

> JUDGE JONES: ***And when I say "objections," that's in the context of paragraph 13 of the protective order there. Sometimes "objections" has a more formal tone to it, but the way it's used here essentially says, if a party does not agree with the producing party's designation, the challenging party shall give the producing party written notice of that objection. So that's the context that we're working within here with respect to step one. I think the next step, then, gives -- states that, if the producing party continues to believe that the confidential information contains information that justifies such designation, it shall so inform the challenging party within five business days. So is that the -- is that what you're suggesting, Mr. Reed, or are you suggesting something else?
>
> MR. REED: No, Your Honor. I was suggesting exactly what the document's paragraph 13 states*** (transcript at page 1392-1393)

25. Applicant's attempt in its Response to find fault with Intervenors for not filing their objection is therefore so completely without merit it is difficult to assume the Response is made in good faith.

26. Irrespective of this baseless attempt to criticize counsel for Intervenors, Pliura Intervenors respectfully move that the confidential and proprietary designation asserted by Applicant be overruled and removed.

27. The information sought is of critical importance here because it proves that the instant project does not qualify as a common carrier by pipeline. Common carrier status is refuted by the allegedly confidential "evidence" and the testimony of Dale Burgess which shows why this configuration makes the current project less of a common carrier than the Keystone XL project to which he contrasted the original SAX project. This is why Applicant is so doggedly attempting to hide the evidence and hamper Intervenors' use of what little it has disclosed.

28. But the sole basis asserted by Applicant in its untimely response is an irrelevant provision of federal law at 49 U.S.C.S. Sec. 16103(a) that states,

> (a) General Prohibition.— A pipeline carrier providing transportation subject to this part, or an officer, agent, or employee of that carrier, or another person authorized to receive information from that carrier, that knowingly discloses to another person, except the shipper or consignee, or a person who solicits or knowingly receives information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that carrier for transportation provided under this part without the consent of the shipper or consignee, if that information may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor the business transactions of the shipper or consignee, is liable to the United States for a civil penalty of not more than $1,000.
> (b) Limitation on Statutory Construction.— This part does not prevent a pipeline carrier providing transportation under this part from giving information—
>
> (1) in response to legal process issued under authority of a court of the United States or a State;

(2) to an officer, employee, or agent of the United States Government, a State, or a territory or possession of the United States; or
(3) to another carrier or its agent to adjust mutual traffic accounts in the ordinary course of business.

(c) Board Employee.— An employee of the Board delegated to make an inspection or examination under section 15722 who knowingly discloses information acquired during that inspection or examination, except as directed by the Board, a court, or a judge of that court, shall be fined under title 18 or imprisoned for not more than 6 months, or both.

29. As stated in Intervenors' notice of objection, there is no factual basis to assert that the disclosure of committed volumes may in any conceivable way be used to the detriment of the shipper or consignee or in any way place the shipper or consignee at a competitive disadvantage.

30. In its response, Applicant has wholly failed to identify any plausible way that the public disclosure of current shipper commitments will harm it or the shipper, except of course the obvious; that disclosure will verify that the project is no longer a common carrier by pipeline. That is not the sort of "harm" from which this statute protects.

31. It is, of course, Applicant's burden to present evidence as to the alleged harm. And as Applicant itself states at paragraph 5 of its Response, "[f]actual statements should be supported by evidence." Applicant has offered nothing and its opportunity to do so has expired.

32. The only argument Applicant offers (as there is no evidence offered) is that the Federal regulation, was imposed "to prevent abuses from speculators and profiteers by shielding this kind of detail from public view". (Response at page 4, note 1) This argument has no relationship to the issues now before the Commission and no applicability to this currently hypothetical pipeline project pending before the Commission.

33. Conversely, there is no question that the exception in Part b(1) of the regulation does apply here.

34. Quite simply, Applicant's position is untenable and must be rejected. And Intervenors must be allowed to use the still largely non-responsive data request answers to demonstrate that the motion to amend should be denied and, if Applicant persists in its current intentions for this pipeline, the underlying Certificate in Good Standing should be revoked.

35. Applicant asserts at paragraph 4 of its response that had it known that Intervenors would challenge its baseless assertion of confidentiality, using the process Applicant defined in the protective order that it authorized and insisted upon, it "would not have agreed to release the information". Very respectfully, Applicant does not get to pick and choose the information it is required to provide to Intervenors. This assertion is emblematic of the exaggerated sense of entitlement that has brought these proceedings to this point and why there is a pending motion to supplement the record with 321 pages of *ex parte* communications.

36. Finally, Applicant seeks to place a veil of secrecy over these public proceedings. There is a presumption that all these matters are issues to be placed in plain sight for the public to view. Applicant is seeking to take private property from Illinois citizens, against their wishes. The Seventh Circuit has emphasized the court's duty to examine proposed protective orders to prevent parties from limiting public access. *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.* 178 F. 3d 943, 944 (7th Cir. 1999). The court recognized "the parties ….are not the only people who have a legitimate interest in the record compiled in …a proceeding. *Id*. The rights of the public kick in when material

produced during discovery is filed with the court. 467 U.S. at 33 & n.19, 104 S. Ct. 2199 (recognizing that the public has a right to access anything that is a "traditionally public source of information" and observing that courthouse records could serve as a source of public information). At this point, the documents have been used in this administrative proceeding and the possibility exists they may influence or underpin the underlying decision of the case. Therefore, the documents are presumptively open to public inspection unless they meet qualified exemptions. *Baxter Int'l*, 297 F. 3d at 545; see also *Citizens First Nat'l Bank*, 178 F. 3d at 945.

WHEREFORE, Pliura Intervenors respectfully pray for an Order overruling and removing the "confidential and proprietary" designation asserted by Applicant as to its "Supplemental Responses to Data Requests".

Respectfully submitted this 24th Day of October, 2014.

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PROOF OF SERVICE

The undersigned certifies that on this 24th day of October, 2014 he served a copy of the foregoing document together upon the individuals on the attached service list, by electronic mail.

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